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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)

Section 257 Proceeding to)
Identify and Eliminate)
Market Entry Barriers)
for Small Businesses)

GN Docket No. 96-113

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To: The Commission

REPLY COMMENTS OF SMALL BUSINESS
IN TELECOMMUNICATIONS

SMALL BUSINESS IN TELECOMMUNICATIONS

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Summary

Although the Commission has implemented pro-competition initiatives that have made it possible for small business to obtain a place in the industry; over time many small businesses have found it difficult to sustain their position and expand. Furthermore, small operators are also facing restricted access to the use of spectrum and barriers to entry in certain markets. The Commission's use of spectrum licensing through auctions is one such barrier that limits access and the competitiveness of small business. Additionally, the Commission should strengthen the rights and opportunities of resellers in resale markets.

The Commission should stay within the boundaries of its mission charged by Congress and implement its enforcement duties in an equitable and timely manner. The Commission must assure that application processing, licensing, and operations are performed in a uniform and timely manner that fully complies with agency rules and policy.

The Commission must define "small business" to eliminate loopholes that allow larger entities to qualify for small business special relief. This type of abuse clearly frustrates the agency's efforts to provide relief to small business.

Small businesses face several barriers to accessing spectrum. One such barrier is the Commission imposed freeze on several radio bands for the purpose of positioning itself for auction. However, due to limitations on capital, small businesses often find it difficult to participate and compete with larger entities during the auction process. The freeze on

applications for radio spectrum and the difficulty in competing in the auction process has the effect of significantly limiting the prospects for future growth and expansion. These limitations also have the added effect of restricting the productivity and efficiency of small businesses that rely on spectrum, thereby negatively affecting our economy.

SBT strongly urges the Commission to utilize alternative forms of licensing, including, but not limited to lotteries, comparative hearings, and first-in-filing/first-in-right. The Commission must balance its efforts to raise revenue through auctions versus the implications of auctions on small business, an integral sector of our economy.

¹ SBT sympathizes with those groups of small businesses which have commented in this proceeding and have pointed out their past problems in communicating with the agency's staff due to funding obstacles, e.g. Comments of *Wireless Cable Association International, Inc.* SBT hopes that the Commission considers carefully the many voices of such groups commenting herein whose chorus speaks to the perceived problems of agency access without the financial capacity to engage in comprehensive lobbying efforts.

telecommunications industry. Its members include operators of paging facilities, resellers, community repeater operators, tower owners and managers, specialized mobile radio licensees, microwave operators, two-way shops, and many other providers of telecommunications goods and services. SBT was formed and is operated to provide additional opportunities for its members by seeking a more equitable regulatory environment for small businesses.

Beginning with only a handful of members, SBT has grown rapidly and now is supported by over one hundred small businesses, manufacturers, and entrepreneurs and its ranks of supporters are increasing weekly. Voting rights are restricted to only small businesses and its agenda is limited to those matters that will promote the viability and competitiveness of small business in all areas of telecommunications. Unlike many trade associations, its board of directors is not comprised of the largest telecommunications entities and providers. Rather, the board consists of small telecommunications providers who not only serve the membership, but share directly in the membership's concerns.

SBT recognizes that small business is a vital segment of the telecommunications marketplace.² Distribution networks, customizing of systems for industrial and local governments, provision of strategic facilities placement through tower leasing, resale of consumer goods and services, development and initiation of new technologies, training for technical support and maintenance of telecommunications systems, and a myriad of other

² As the Commission has noted at paragraph 6 of the Notice of Inquiry (NOI), the Small Business Administration (SBA) has found that small business "constituted the vast majority of all employers, employed 53% of the private work force, and provided 50% of all receipts."

significant functions in support of the nation's telecommunications marketplace and infrastructure is all provided by small business. Small business' history of participation, innovation, price competition, and provision of services to the Country's consumer cannot be minimized or ignored in the creation of future regulatory efforts -- some of which should be specifically directed at elimination of barriers to market entry for these vital companies and which should reduce the assault on the future competitiveness of small business. "Small entrepreneurs, as well as larger firms, should be encouraged to participate in the competitive markets mandated by the Telecommunications Act of 1996, and no firm should be unnecessarily encumbered by rules that do not serve the substantive purposes of the Act." Comments of *AT&T* at page 1.

Improving Competitiveness

SBT's primary objective is to improve the competitiveness of small business. As stated in its comments, SBT seeks the Commission's assistance in recognizing the individual concerns and decision making processes of small business, including its required investment strategy. Absent an appreciation of the dynamics of small business operation, the Commission will continue to loft heady rules and spectrum usage plans that require substantial financial commitments outside the reach of small business. Such faux opportunities provide little relief for small business which must simultaneously compete with large incumbent operators that forward business strategies contrary to the financial health of smaller firms. "Unquestionably, pro-competition initiatives have made it possible for small businesses to obtain a place in the industry. But, over time, their position has been besieged by the backlash of the incumbent carriers' efforts to protect their domains." Comments of *ACTA* at page i.

SBT avers that large businesses are quite capable of protecting their respective market shares through economic power. As the Commission is well aware, large businesses can issue debt instruments, receive favorable terms for bank lending, or engage in additional placement offers of equity instruments to raise necessary capital for participation in spectrum auctions or construction of systems. None of these methods are available to small business. Accordingly, the Commission must create methods for small business participation and continued competition that do not require a departure from the financial realities of the marketplace.

Although past actions of the Commission have supported the continued existence of small business and its vital contribution to the economic health of the industry, recent concentration on the employment of auctions for spectrum licensing is undermining the Commission's past support of this class of operators and licensees. "Indeed, an analysis would reveal that while policies have been adopted to provide both opportunity for entry and survival, the aftermath of retreat from substantive principles, accompanied by lax enforcement, doomed any chance for survival, making the entry that was achieved short-lived and ineffectual." Comments of *ACTA* at i-ii. Other commenting parties have also noted that the Commission's policies and rules have a direct impact on market entry by small business, minorities and women. See Comments of *Southwest Missouri Cable, Inc.*; Joint Comments of *American Women in Radio and Television, Inc.* and *Women of Wireless*; the *National Black Caucus of State Legislators*; *Romar Communications, Inc.*; and *Cable Telecommunications Association*. Insofar as the aforementioned parties have focused on the remedial actions that the Commission might take

within its jurisdiction, SBT supports those commenters which have sought such relief for small business.³

SBT believes that the Commission should take positive steps to assist small business maintain and increase its competitive position. The Association joins with other entities which seek to tap the energy and power of small, minority or women-owned businesses, to create greater benefits for the market and the nation. Barriers created by and through regulation or the natural effects of regulation which appears neutral should be eliminated to bring forth this economic vitality. "To the extent that such barriers exist, the creative abilities and economic benefits from the commerce which could be generated by these enterprises in the absence of the such barriers should be unleashed." Comments of *The United States Telephone Association* at page 3.⁴ SBT further supports *ACTA's* comments that seek to extend the zone of the Commission's interest beyond barriers to market entry, to increased support of small business following entry. "The Commission should formulate regulations and policies which not only remove entry barriers, but which also create a competitive environment which permits small businesses' ability to sustain and expand their market presence once entry has been achieved.

³ Many commenters noted that the Commission sought information regarding matters outside its jurisdiction and control. Although the responses to these inquiries is interesting, SBT joins with those commenting parties in requesting that the Commission focus primarily on actions it can take to assist small business efforts.

⁴ The comments filed demonstrate clearly that women and minority businesses require remedial assistance and relief, and illustrate many of the problems suffered by all small business. See, Comments of *National Association of Women Business Owners*; *Kansas Star Communications*; *United States Hispanic Chamber of Commerce*; *National Black Chamber of Commerce*; and *National Women's Law Center*.

Such negotiations would satisfy Congress' intent to remedy past wrongs." Comments of ACTA at page 3.

Additionally, SBT supports the Comments like the *Telecommunications Resellers Association*, which group seeks to maintain the ability of its members to compete in the marketplace and to maintain any competitive opportunity that might be removed by the unilateral actions of large, dominant carriers. To those ends, the Commission should strengthen the rights and opportunities of resellers and the resale market which is very often the avenue employed as an entrance to the marketplace.

Enforcement Assistance

As stated in SBT's comments, it is imperative for the Commission to improve its enforcement efforts. Equal and expeditious enforcement of rules as applied to all operators must be of paramount importance for the Commission to succeed in aiding small business. Without such effort, the Commission sets large business upon small, without legal protections that would offset abuses, predatory practices and monopolistic efforts designed to cripple and destroy small business competitors. SBT has noted through its survey responses, including early reported specific instances, that the Commission's record of timely enforcement is not improving. To the contrary, the record shows that the Commission's record has worsened and that many enforcement matters continue to languish before the agency to the detriment of the affected

parties.⁵ The Comments of *SaMComm, Inc.* and *Big Sky Teleconferencing, Ltd.*, report that "[t]here are currently 385 formal complaints pending before the FCC for periods ranging from 17 months to 9 years." *Id* at page 3. These figures likely reflect only those complaints that have been lodged against common carriers.

If one were to simplify the mission with which the Commission has been charged by Congress, the elements of the agency's mandate would be a short list including (1) allocate spectrum; (2) devise appropriate methods of licensing; (3) protect authorized uses of the radio spectrum; and (4) enforce the rules created to perform elements 1-3. Congress has also directed the Commission to act in the public interest, convenience and necessity and to regulate in a manner that discourages anticompetitive actions by telecommunications entities. If the Commission's enforcement record was scrutinized in accord with these basic elements of its Congressional mandate, it is obvious that the Commission would not rate well. The reasons are obvious.

The Commission has a recent history of focusing on spectrum allocation and licensing (recently by auction) to the exclusion of all of its remaining duties. Licenses are issued wholesale and then continued use is left unprotected and unrestrained. Violations of rules are ignored and complaints are discouraged. Persons, relying on the agency's protection when

⁵ "Justice delayed is justice denied. Small competitors need rapid redress of competitive wrong-doing by the entities on which they must depend to obtain the facilities and services necessary to themselves provide service to their customers and with which they are in direct competition." Comments of *ACTA* at page 9.

investments are made, discover that lawlessness is rampant and many of the recalcitrant operators are quite large companies. Large companies that are the subject of complaints manipulate the Commission's processes to delay and make more costly the complaint procedure, to discourage and frustrate complaining parties.⁶ Meanwhile, the Commission sets blithely by and watches as small businesses declare bankruptcy due to their lack of funds to combat or adjust to the improper behavior that is plaguing operations and growth. It is not enough to simply provide licenses to the public. The Commission must assure that application processing, licensing, and operations are all performed by all operators in a manner which is fully compliant with the agency's rules. To do less is to create the present environment of ruthless, unrestricted competition, complete with Social Darwinism on a monumental scale. Unfortunately, the victims of these battles are not only small businesses but the millions of customers which they serve.⁷

The opportunities which the Congress intended to extend to small business by and through the creation of Section 257 are obvious. Congress intended that the Commission focus on the effects of its past record and determine what barriers are created within the natural

⁶ "FCC records would indicate that in the past ten years, or longer, no formal complaint has ever been set for hearing with the examination of witnesses, save for one case, and that too was eventually settled before witnesses were required to appear and give testimony." Comments of *ACTA* at page 6.

⁷ The Commission's records are filled with informal and formal complaints that have languished awaiting action and the results of the agency's inaction has been devastating. "The complaint process, as it currently stands, is ineffective and expensive. In effect, there is no simple, cost effective remedy a small carrier can use, to force compliance when a larger carrier violates the law." Comments of *Nevadacom* at page 4.

environment of the marketplace, and which barriers are being created by the agency's actions or inactions. SBT respectfully contends that the opportunities created simply through access, although extremely important, are insufficient to meet the intent of Congress. Rather, the agency must enforce its rules and perform a serious review of its complaint procedures to end the delays and denial of justice which small business vitally needs in its ongoing efforts to maintain its competitive position.

To fully participate, small business should have the same opportunity to achieve the level of growth, the margin of profit, the ability to fund research and capital investment and to attract any type of customer that their labor, talent and management permits them to achieve without being handicapped or harmed by the misuse and abuse of the inherent competitive and other advantages their large incumbent competitors possess. To ACTA, this means the Commission must increase its oversight and enforcement efforts and its ability to act promptly and decisively when presented with evidence of competitive abuse.

Comments of *ACTA* at page 4. (emphasis added) Accordingly, SBT seeks a level playing field in the operations of radio facilities, which does not provide advantages (such as extended implementation schedules) for large companies, while penalizing smaller firms for construction/operation within the letter of the law; which does not create an environment for acceptance of unsupported waiver requests that are granted based more on the size of the requesting party rather than the logic and reasonableness of the request; and which rewards entities that possess the ability to lobby unrestrictedly the Commission's staff.⁸

⁸ SBT supports the Comments of the *Cable Telecommunications Association*, wherein CTA recommended the agency's stricter adherence to the tenets of the Administrative Procedures Act, including the publication of specific rule language during the NPRM stage of rule making proceedings, to better inform commenting parties. See, Comments of CTA at pages 6-12.

Enforcement of the Commission's rules must be a priority if the Commission is to meet its Congressional mandate and provide meaningful relief. Although persons often focus only on interference complaints when the subject of enforcement is broached, SBT urges the Commission to apply its enforcement efforts to all areas, to provide the only plausible assurance of fair play between competing operators. To do less is to perpetuate and exacerbate the abuses suffered by small business to date.

To date, the Commission's enforcement efforts are abysmal, particularly in the area of protecting small business operations. Although this comment is regrettably harsh, no other credible evaluation is plausible. The obvious conclusion to be drawn by this record is that the Commission lacks the willingness to provide this vital function. So much the pity. The question that must be asked is whether the agency, following receipt of the numerous comments submitted in this proceeding, will now appreciate the daily, extreme harm that its lack of commitment to enforcement has imposed on small business participants. The same challenge was reflected in the Comments of the *Small Business Administration* wherein it called on the agency to reflect, "[a] willingness to challenge market inequities that have been in place for a long time." SBT joins in that challenge and believes that the starting point must be in the area of enforcement, to level the competitive playing field and mete out punitive actions against all violators of the agency's rules, regardless of size.

The Definition of "Small Business"

SBT urges the Commission to properly identify "small business" in its future efforts to enforce its rules related to access and auction participation. Numerous comments filed noted that the agency has engaged in a shifting and customized definition of small business in a number of proceedings. In some actions, i.e. PCS Block C auctions, the agency's definition and financing loopholes have rendered moot any effort by the agency to provide special relief for small business. SBT supports the Comments of the *Community Broadcasters Association* and others which have fully demonstrated that the agency has failed to properly identify the characteristics of small businesses for regulation and participation. The agency's failure to properly provide opportunity for small business has been echoed time and again by the commenting parties, and has rendered the agency's enforcement under its Congressional mandate at 47 U.S.C. §309(j) to be largely ignored for small business and rural telephone companies.

Greater Access To Spectrum

The Commission must engage in a meaningful self-examination to determine the extent the severe damage it is inflicting on small business by its indiscriminate use of "freezes" to forward its agenda of use of auctions for the licensing of radio spectrum. At present, the Commission has frozen, in part or in whole, portions of the 33, 43, 150, 220, 450, 800, and 900 MHz radio bands, all for the purpose of positioning the agency for future auction. Were this action not devastating enough to small business, the agency's track record for assuring meaningful participation by small business in these auctions is terrible. Therefore, the end result is that small businesses, once frozen from applying for additional channels, are unlikely to ever

be able to obtain additional, necessary spectrum for continued growth. This problem is tantamount to ripping away both the present and future competitiveness of small business for little more than thirty pieces of silver.

Small business deserves and requires much more consideration by the agency. Freezes are devastating to small business. Prolonged freezes, like the one suffered by SMR operators, are economic starvation. If agencies had a conscience, the Commission should be ashamed of its shabby treatment of small business in its effort to first justify the SMR freeze by creating a self-imposed backlog of applications to justify its actions, then employing the freeze to maintain the artificially created status quo in preparation for auction.

SBT's survey showed that many small businesses offer a number of goods and services to the public, including SMR and paging services. Yet, the agency has determined that small business' reliance on the continued viability of these local systems is to be undermined and all efforts toward growth are to be curtailed, to forward a political agenda which is single-mindedly pro-auction. Business plans are halted. Strategies are abandoned. Economic opportunities are rendered unreachable. Still, the agency continues its freezing folly in band after band, without regard to the harm being inflicted.

SBT strongly disagrees with AMTA that the Commission's actions are motivated or required by the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993), see Comments of AMTA at pages 6-7. A careful reading of that legislation would fully

demonstrate that the Budget Act has been employed to engage in much regulatory mischief which was neither contemplated nor required by Congress. SBT is surprised that AMTA would lean on this language as an apology for the Commission's past mistakes, assisting the agency in passing the buck to Congress. The overly expansive use of the Budget Act language to justify threatening the livelihood of small business operators is purely a creature of the Commission's, and Congress should not be made to bear the ire of small business for the Commission's misuse of that statutory language. This proceeding should be employed to assist the agency in recognizing its past failures and its need to concentrate on better serving small business. It should not be a forum for trotting out tired excuses for past regulatory mistakes.

Alternatively, the Commission should employ this proceeding to engage in an honest review of its attempts to comply with the tenets and spirit of 47 U.S.C. §309(j), which directed the Commission to employ its expertise to disseminate licenses among a broad spectrum of persons, including small business, rural telephone companies, and minority owned firms. The language of the Telecommunications Act specifically allow for the use of any one of a myriad of licensing methods. The Commission's receipt of auction authority did not preclude the agency's use of any other form of licensing, including lotteries, comparative hearings, first-come-first-served, or others. Yet, the Commission has not performed any analysis of alternatives and appears wholly driven toward the raising of federal revenues. "Sadly, the Commission's recent regulatory and policy-making actions speak of a much different focus --- one which emphasizes the generation of money for the federal treasury at the expense of those

entities that require the Commission's assistance to succeed and which Congress has directed the FCC to assist." Comments of *Rural Telecommunications Group* at page 2.

As SBT has stated in this and other proceedings, the use of a singular litmus test, the generation of revenue for the federal coffers, is a poor one for determining a party's commitment to delivery of services. Auctions as they are presently operated, with token considerations for designated entities, are a rigged game in favor of companies with deep pockets. Even the Commission's faux efforts to encourage small business participation in the PCS Block C auctions was a dismal failure.⁹ It is time for the agency to recognize publicly that its efforts to increase small business participation have failed and that much more will be required to avoid the agency's past disasters.¹⁰

⁹ Close scrutiny must also be paid to the ways in which larger businesses would try to circumvent [small business] limits. The old tricks of the monied owner putting up a small business front person as the majority stockholder (non-voting stock), while he/she holds the majority of the voting stock, among other tricks need to be thwarted. These sham deals must be prevented from making a mockery of the intent of Section 257.

Comments of TRA Communications Consultants, Inc. at page 3.

¹⁰ SBT notes that the agency has attempted to employ the results of the 900 MHz SMR auctions as evidence of a successful application of its small business preferences at auction. However, the Commission did not report that the auction resulted in small business paying for spectrum at a rate which was 61% higher than large carriers, even following the agency discounts. This figure alone demonstrates that small businesses' success was at a disproportionate high cost and that any success gained by small business was not by or through any successful program created by the agency.

One adjustment in the Commission's use of its auction authority must be applied to insure proper use of this new authority: as stated in the Act, **auction authority should only be applied to resolve cases of mutual exclusivity**. It is a remedy. It should not be applied to situations where mutual exclusivity does not exist or where mutual exclusivity, but for the anticipation of revenue to be generated by an auction, would not exist.

Immediate steps should be taken to lift one or more of the application freezes which are impeding the growth of small business. SBT urges the Commission to, first, lift the freeze on applications for modification and expansion of 800 MHz radio systems. The two-year siege on small operators has had disastrous consequences and continues to cause economic havoc. Such a freeze is wholly improper as a precursor to any auction, since use of the Commission's auction authority is unjustified, improper, and without support of law. The Commission need look no farther than the fact that but for any proposed auction, no mutual exclusivity would exist whereby an auction remedy would be applied. In sum, the auction of 800 MHz spectrum is without statutory authority and, upon reconsideration, should be rejected as any basis for continuing the freeze.

Beginning, then, with the lifting of the 800 MHz freeze and the rejection of any use of auction authority to license spectrum in that band, the Commission can start on the road back to providing service of the public, without regard to receipts of auction proceeds. It can begin to heal the schism of interest which has arisen between small business and the agency. It can restore the dignity of thousands of Americans that are proud of their accomplishments in

constructing and operating radio systems that serve millions of consumers. It can duplicate its efforts at 220-222 MHz, rejecting use of auctions in that frequency band, leaving undisturbed the business plans of thousands of small businesses which turned to this new opportunity only to have each's operational flexibility badly curtailed by freezes. It can focus on "earned" exclusivity among formerly private carrier paging companies based on benchmarks of channel usage in markets. It can appreciate the cost of simultaneous bidding which continues on for interminable rounds at auction. It can explore whether a \$2.30/minute charge for telephone service to participate in auction is reasonable or fair. It can recognize that geographic areas, arbitrarily selected for ease of licensing have little relevance to the operation of facilities and past licensing efforts. In sum, the Commission can do much, much more to create assistance rather than additional market barriers for small business and its need to gain greater, not lesser, access to spectrum and the agency itself.


Conclusion

SBT notes that a number of the commenting parties have suggested that the agency's efforts in compliance with Section 257 are illusory. At least four commenting parties questioned whether the agency was sincere in its request that the public assist in directing the Commission toward better performance in the advancement of small business access to markets, spectrum and economic opportunity. SBT is not willing to cast aspersions upon the Commission and assumes that its efforts in this proceeding are motivated by an honest desire to improve the status of small business. However, SBT avers that more is necessary in the area of tangible remedies for past neglect and failures committed by the agency. And, although SBT recognizes that its statements

are sometimes harsh and its criticism biting, it is the dire situation of its membership which motivates SBT toward hyperbole. A clarion call is required to wake up elected representatives and agency personnel to the overlooked needs of small business. SBT hopes that its efforts within this proceeding will provide this necessary attention to the mounting problems caused by the agency and by entities which have taken unfair advantage of the agency's actions.

Respectfully submitted,
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